

FCC MAIL SECTION

³ Although advanced services can also be deployed using other technologies over satellite, cable, and wireless systems, the issues raised in this docket are limited to wireline services. We use the term "wireline" in this order to refer to facilities that have traditionally been deployed by telephone companies. This is distinct from the coaxial and other cable facilities that have traditionally been deployed by cable companies.

2. Although both incumbent local exchange carriers (LECs) and new entrants are developing and deploying innovative new technologies to meet the ever-increasing demand for high-speed, high-capacity advanced services, including enhanced Internet access, the consumer market is still in the early stages of development.⁴ Congress has directed the Commission to ensure that advanced services are being deployed on a reasonable and timely basis to all Americans, including residential consumers.⁵ In order to encourage carriers to develop and deploy new advanced services to all markets, we are committed to ensuring that incumbent LECs and competitive carriers alike are able to make their decisions to invest in, and deploy, advanced telecommunications services based on market demand and their own strategic business plans, rather than on regulatory requirements.

3. In this *Second Report and Order*, we address the issue raised in the *Advanced Services NPRM* of whether the discounted resale obligation of section 251(c)(4) applies to incumbent LEC provision of advanced services without regard to their classification as telephone exchange or exchange access. As discussed below, we determine that our analysis of section 251(c)(4) requires a fact specific evaluation of the features and characteristics of a particular transaction. Based on the record before us, we conclude that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service.⁶ This finding reinforces the resale requirement of the Act by ensuring that resellers are able to acquire advanced services at wholesale rates. We reach a different result as to advanced services sold to Internet Service Providers for inclusion in a high-speed Internet service offering. We conclude that these advanced services are inherently different from advanced services made available directly to business and residential end-users, and as such, are not subject to the discounted resale obligations of section 251(c)(4). The Commission's determination herein should encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.

⁴ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146, Report, 13 FCC Rcd 15280, 15297, para. 48. (1999) (*Section 706 Report to Congress*).

⁵ See Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

⁶ 47 U.S.C. § 251(c)(4).

II. Background

4. Section 251(c)(4) imposes on incumbent LECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."⁷ In the *Local Competition First Report and Order*, the Commission emphasized that the resale obligation under 251(c)(4) extends to *all* such telecommunications services.⁸ The Commission concluded that "an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a 'telecommunications service'; and (2) is provided at retail to subscribers who are not 'telecommunications carriers.'"⁹ The Commission concluded, however, that because exchange access services "are predominantly offered to, and taken by," telecommunications carriers, exchange access services are not subject to the provisions of section 251(c)(4).¹⁰

5. In our *Advanced Services Memorandum Opinion and Order* we determined that by the plain terms of the Act, advanced services offered by incumbent LECs are telecommunications services.¹¹ Accordingly, we concluded that, pursuant to section 251(c)(4), incumbent LECs have the obligation to offer for resale at wholesale rates all advanced

⁷ 47 U.S.C. § 251(c)(4). "Telecommunications service" is defined in section 3(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is, in turn, defined in section 3(43) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications carrier" is defined in section 3(44) to mean "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44).

⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15930, 15931, 15934, paras. 863, 865-66, 871. (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom.*, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively *Iowa Utils. Bd. v. FCC*), *aff'd in part and remanded*, *AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. August 18, 1997), *further recons. pending*.

⁹ *Id.* at 15934, para. 871.

¹⁰ *Id.* at 15934, para. 873. "Exchange access" is defined in section 3(16) to mean "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

¹¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24029, para. 35. (1998) (*Advanced Services Order and NPRM*). For purposes of this discussion, the term "advanced services" has the meaning set forth in Commission rule 51.5.

services that they generally provide to subscribers who are not telecommunications carriers.¹² We further concluded that incumbent LECs must offer advanced services for resale pursuant to section 251(c)(4), whether such services are deemed telephone exchange service or exchange access services. In the accompanying *Notice of Proposed Rulemaking*, we tentatively concluded that, to the extent advanced services are exchange access services, these services are fundamentally different from the exchange access services that the Commission excluded from the obligations of section 251(c)(4) in the *Local Competition First Report and Order* because advanced services will be offered predominantly to residential or business end-users or to Internet service providers and not to telecommunications carriers.¹³ Accordingly, in the *Advanced Services NPRM*, we sought comment on the applicability of section 251(c)(4) to advanced services to the extent that such services are exchange access services.¹⁴

III. Discussion

6. Incumbent LECs are marketing and providing DSL services in two distinct ways: (1) directly to residential and business end-users; and (2) to Internet Service Providers who package it as part of a high-speed Internet service. Some incumbent LECs have filed tariffs with the Commission offering single lines of DSL service to end-user customers.¹⁵ Incumbent LEC advertising for these services makes clear that these single line DSL offerings

¹² *Id.* at 2404, para. 60.

¹³ *Id.* In the *Local Competition First Report and Order*, the Commission drew a distinction between telecommunications services "targeted to end-user subscribers," which Congress "clearly intended" to be subject to the resale requirement, and those "predominantly offered to, and taken by" interexchange carriers which are not subject to the resale requirement under 251(c)(4). *Local Competition First Report and Order*, 11 FCC Rcd at 15935, para. 874.

¹⁴ *Advanced Services Order and NPRM*, 13 FCC Rcd at 24094, paras. 187-189. US West has sought judicial review of the Commission's determination that advanced services are telecommunications services, and that carriers offering such services are subject to the obligations of section 251(c). The Commission has requested and received a remand from the United States Court of Appeals for the District of Columbia Circuit to address US West's argument that the Commission is without statutory authority to subject incumbent LECs to the requirements of section 251(c) in the provision of advanced services. *See US West v. Federal Communications Commission*, Order No. 98-1410 (rel. August 25, 1999). In this decision, the court declined to vacate portions of the *Advanced Services Order* challenged by US West. After receiving a more complete administrative record, we intend to fully address US West's arguments in a subsequent order in this docket. *Public Notice Requesting Comments in Connection with Court Remand of August 1998 Advanced Services Order*, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147 (rel. Sept. 9, 1999). We note that the Commission made a commitment to the D.C. Circuit Court to consider and address within 120 days the issues raised by US West.

¹⁵ *See* Bell Atlantic Transmittal No. 1081.

are designed for and offered to the ultimate end-user because the incumbent LEC will be performing functions such as marketing, billing, and customer care for the end-user.¹⁶

7. Incumbent LECs are also entering into arrangements directly with Internet Service Providers, such as America Online (AOL) and Prodigy, pursuant to which the Internet Service Providers purchase large volumes of DSL lines at various discounts based on the number of lines purchased and the duration of the plan.¹⁷ For example, Bell Atlantic recently filed a transmittal with the Commission revising its ADSL tariffs to include volume and term discount plans.¹⁸ Pursuant to the Bell Atlantic tariff, some Internet Service Providers, such as AOL, are purchasing the DSL service, combining the service with their Internet service, and offering the combined high-speed Internet service directly to end-user subscribers.¹⁹ The tariff requires the entities obtaining the bulk DSL services, whether Internet Service Providers or carriers, to perform certain functions with respect to the DSL service supplied to them, including provisioning all customer premises equipment (CPE) and wiring, providing customer service, and marketing, billing, ordering, and repair.²⁰

8. As discussed below, based on our examination of the statutory language, the Act's purpose, and the specific facts before us, we conclude that advanced services sold to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange

¹⁶ See <www.bellatlantic.com/infospeed/more_info/pricing.html> (Bell Atlantic offers "Personal Infospeed" service for \$49.95/month. The service is marketed directly to residential consumers).

¹⁷ See Letter from Steven Teplitz, America Online Inc., to Staci L. Pies, Attorney Advisor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 98-148 (filed April 29, 1999) (AOL April 29 *Ex Parte*).

¹⁸ Bell Atlantic Transmittal No. 1138, Bell Atlantic Tariff F.C.C. No. 1. (Bell Atlantic Bulk DSL Tariff). On June 2, 1999, the Commission released a Partial Suspension Order suspending language in the transmittal that stated that "[t]he telecommunications services offered under the volume and term discount plan are provided at wholesale to carriers and non-carriers" and that such services are not services provided "at retail and, accordingly, are not subject to the rate provisions of sections 251(c)(4) and 252(d)(3)" The Commission allowed the remainder of the tariff to go into effect. *Bell Atlantic Revisions to Tariff F.C.C. No. 1, Revisions to Tariff F.C.C. No. 11*, Partial Suspension Order, CC Docket No. 99-2201, DA 99-1060 (rel. June 2, 1999). Although these services are offered to both Internet Service Providers and other carriers, the plain language of section 251(c)(4) makes clear that the discounted resale obligations apply only to telecommunications services sold to subscribers who are not telecommunications carriers. 27 U.S.C. § 251(c)(4). Our analysis in this order, therefore, addresses only those circumstances where the volume and term discount plan is offered to Internet Services Providers.

¹⁹ We note that Internet Service Providers would not offer Bell Atlantic's ADSL service on a stand-alone basis without packaging it with their Internet services. See Letter from Steven Teplitz, America Online Inc., to Staci L. Pies, Attorney Advisor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 98-147 (filed July 26, 1999) at 3 (AOL White Paper). In addition, the volume and term discount plan is available to carriers as well as Internet Service Providers.

²⁰ See Bell Atlantic Bulk DSL Tariff, Third Revised Page 918.42, para. 16.8(F)(4)(a). See also AOL White Paper at 13-14.

access service.²¹ Moreover, we conclude that advanced services sold to Internet Service Providers under the volume and term discount plans described above are inherently and substantially different from advanced services made available directly to business and residential end-users, and as such, are not retail services and are not subject to the discounted resale obligations of section 251(c)(4).

9. Section 251(c)(4) imposes on incumbent LECs the duty to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."²² The category of services subject to the provisions of section 251(c)(4) is determined, therefore, by whether those services are telecommunication services that an incumbent LEC provides (1) at retail and (2) to subscribers who are not telecommunications carriers.²³

10. The record reflects, and the parties agree, that advanced services are telecommunications services that predominantly are offered to residential and business end-users and to Internet Service Providers — all subscribers that are not telecommunications carriers.²⁴ Moreover, the parties do not dispute that advanced services made available directly to business and residential end-users are provided "at retail."²⁵ The only real dispute in this proceeding is whether advanced services sold to Internet Service Providers pursuant to volume and term discount plans are subject to the discounted resale obligation under section 251(c)(4). Answering this question requires that we examine the language of this section, and in particular, determine the proper interpretation and application of the term "at retail."

²¹ 47 U.S.C. § 251(c)(4).

²² *Id.*

²³ *Id.*

²⁴ See, e.g., ALTS Comments at 68; CBT Comments at 40. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11536, 15486 paras. 73-82 (1998) (*Report to Congress on Universal Service*) (Internet Service Providers are not telecommunications carriers). But see *US West v. Federal Communications Commission*, Order No. 98-1410 (rel. August 25, 1999) (arguing that the Commission is without statutory authority to subject incumbent LECs to the requirements of section 251(c) in the provision of advanced services); GTE Comments at 110.

²⁵ See, e.g., Letter from Susanne Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-147 (filed March 4, 1999) at 2 (Bell Atlantic March 4 *Ex Parte*) (acknowledging that section 251(c)(4) applies to services targeted to end user subscribers; Cincinnati Bell Comments at 40 (stating that "CBT does not dispute that advanced telecommunications services will be offered to retail customers"); Letter from Ernest B. Kelly, III, President TRA, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 98-147 (filed April 27, 1999) (TRA White Paper). See also BellSouth Comments at 28-29 (stating that in addition to offering advanced services at retail to residential and business end-users, advanced services offerings will be sold in bulk to Internet Service Providers).

A. Absence of Plain Meaning

11. Although Congress used the term "at retail" to identify the types of transactions that are subject to a wholesale discount, it is not clear how the Commission should interpret the term. The Act does not define the term "at retail," and the legislative history on section 251(c)(4) provides only minimal clarification of Congress' intentions with regard to the appropriate definition and application of the term. Although the legislative history suggests that the Commission should interpret section 251(c)(4) in such a way so as to create affordable resale opportunities in order to stimulate the development of local competition, while still allowing incumbents to recover their costs for providing these services, there is no indication in the legislative history that Congress considered how "at retail" should be construed in the context of the sale of data services to Internet Service Providers as an input component to their information service offerings to the ultimate end-user.²⁶

12. We agree with AOL that given the recent emergence of DSL technology to provide high-speed Internet service, Congress likely did not anticipate the prospect of bulk DSL services designed primarily for Internet Service Providers and others to be used in conjunction with information services offered to ultimate end-user customers.²⁷ Because the meaning of the term "at retail" is not clear and unambiguous from the language of the act, using the traditional tools of statutory construction, we look to the ordinary and common meaning of the term "at retail" and to the overall purpose of the Act, and sections 251 and 706 in particular, to determine a reasonable interpretation in this context.²⁸

B. Ordinary Meaning of "At Retail"

1. Sale to End Users

13. Although the parties generally agree that the Commission should adopt the common and ordinary definition of the term "at retail," they disagree upon what constitutes that ordinary meaning. Webster's Unabridged Dictionary defines the term "retail" as "the sale of commodities, goods, articles, etc. individually or in small quantities or parcels directly to

²⁶ See H. Conf. R. No. 458, 104th Cong. 2nd Sess. at 122 ("Conference Report"). The conference committee relied in part on the House Amendments, Section 242(a)(3), of the Senate Bill. *Id.* at 120. Section 242(a)(3) would have required incumbent LECs to "offer resale at economically feasible rates to the reseller" for the purpose of spurring competition "in the local exchange market." H.R. Rep. No. 204, 104th Cong. 1st Sess. at 72.

²⁷ AOL White Paper at 7.

²⁸ See AOL White Paper at 8, n.9, citing *McBoyle v. United States*, 283 U.S. 25 (1931); *Sundstrand Corp. v. Commissioner of Internal Revenue*, 17 F.3d 965 (7th Cir. 1994); *Nesovic v. USA*, 71 F.3d 776 (9th Cir. 1995). See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). See also Letter from Larry Irving, Assistant Secretary for Communications and Information, United States Department of Commerce, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 98-147 (filed May 7, 1999) at 2 and n.7 (NTIA May 7 *Ex Parte*).

the consumer."²⁹ Similarly, Black's Law Dictionary defines retail as "[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale) . . . to the ultimate consumer."³⁰ Based on these definitions, we agree with commenters that retail transactions necessarily involve direct sales of a product or service to the ultimate consumer for her own personal use or consumption.

14. Therefore, whether the buyer uses the purchased DSL service to create a combined product, such as an information service, to be sold to an ultimate end-user or instead consumes the product itself is directly relevant to our analysis of the transaction. For that reason, we carefully analyze the nature of the sale to determine whether or not the service is provided to a particular group of customers "at retail." We disagree with TRA and NAS that the fact that some incumbents are making DSL services directly available to businesses and residential end-users ends our inquiry and requires a finding that all DSL services, whether sold to business and residential end-users directly or sold to Internet Service Providers, are retail services.³¹ We do not find persuasive TRA's argument that Internet Service Providers are the ultimate consumers who are using or consuming the DSL services.³² An Internet Service Provider is purchasing the DSL service for the sole purpose of combining the telecommunications service with its own information service and offering a new retail service, *i.e.*, high-speed Internet service, to the ultimate end-user.³³ In this process, the Internet Service Provider adds value to the bulk DSL telecommunications service by dividing that service for individual consumer use and adding the Internet service, thus enabling the Internet Service Provider to offer and sell the newly created information service to the ultimate consumer: the residential or business subscriber. For these reasons, the Internet Service Provider is not the ultimate end-user.

²⁹ Webster's Deluxe Unabridged Dictionary, 1545 (2nd ed. 1987).

³⁰ Black's Law Dictionary 1315 (6th ed. 1990). Letter from W. Scott Randolph, Director - Regulatory Matters, GTE, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 98-148 (filed March 10, 1999) (GTE March 10 *Ex Parte*), citing Webster's Ninth New Collegiate Dictionary (1989); TRA White Paper at 4, citing Black's Law Dictionary (Centennial Edition) 6th Edition, 1597 (West Publishing Co. 1990).

³¹ Letter from Rodney L. Joyce, Shook, Hardy & Bacon, counsel, Network Access Solutions, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-147 at 5 (filed May 5, 1999) (NAS White Paper); TRA White Paper at 2-4 (arguing that whether the Internet Service Provider consumes the service directly or uses the service as an input to create a different product or service to be sold to the end-user is not relevant to our analysis of the transaction). See also Letter from Ruth M. Milkman, Lawler, Metzger & Milkman, counsel, NorthPoint Communications, Inc. to Magalie Roman Salas, CC Docket No. 98-147 (filed May 25, 1999) (Northpoint May 25 *Ex Parte*) (arguing that section 251(c)(4) applies to DSL services, regardless of whether they are subject to a volume discount, but that there might be no additional avoided costs with respect to the volume discount offering, so that the wholesale discount on that offering would be 0%).

³² TRA White Paper at 5.

³³ Report to Congress on Universal Service, 13 FCC Rcd at 15486, paras. 73-81.

2. Nature of Bulk Services

15. Further, the DSL services that incumbents are offering to Internet Service Providers specifically contemplate that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus reinforcing our conclusion that the bulk DSL services are not retail services offered to the ultimate end-users. Bell Atlantic's volume and term discount plan tariff illustrates this point. Pursuant to Bell Atlantic's tariff, the purchasing Internet Service Provider must provision all CPE and wiring to its end-users, provide customer service directly to the end-users, and assume sole responsibility for marketing, ordering, installation, maintenance, repair, billing and collections vis-a-vis the end-user subscriber.³⁴ Any Internet Service Provider that purchases a bulk DSL service must itself, rather than the incumbent, provide these typical retail services to the ultimate consumer. These facts underscore that bulk DSL services sold to Internet Service Providers are markedly different from the retail DSL services designed for individual end-user consumption.

16. In contrast, some incumbent LECs are selling single lines of DSL service directly to residential and business end-users. Parties do not dispute that these customers are the ultimate end-users of the DSL service. These customers buy the DSL service to meet their own internal telecommunications needs.³⁵

C. Statutory Purposes and Context

17. Our interpretation of the term "at retail" to mean a sale to an ultimate consumer is consistent with our previous determination that section 251(c)(4) should apply only to services targeted to end-user subscribers, consistent with Congress's intent. As stated previously, in the *Local Competition Order*,³⁶ the Commission recognized that although exchange access services may be purchased at times by end-users, such services are designed for, and sold to, interexchange carriers as an input component to the interexchange carriers' own retail services. The Commission reasoned that Congress intended section 251(c)(4) to apply to services targeted to end-user subscribers, because only those services would involve

³⁴ Bell Atlantic Bulk DSL Tariff, Third Revised Page 918.42, para. 16.8(F)(4)(a).

³⁵ We note that in some cases, incumbent LECs provide these retail services directly to business end-user subscribers under arrangements where the end-user makes volume and term commitments and pays discounted rates. These business subscribers are also purchasing the services to meet their own telecommunications needs. Specifically, Bell Atlantic provides Customer Specific Arrangements ("CSAs") that involve the provision of telecommunications services at retail. Just as other advanced services sold to the ultimate end-user, these CSAs include retail functions that Bell Atlantic performs directly for the end-user. For example, under a CSA, Bell Atlantic is responsible for accepting repair requests directly from the end-user. See Letter from Susanne Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-147, Attach. 2 at 1 (filed Oct. 18, 1999).

³⁶ *Local Competition Order*, 11 FCC Rcd at 15934, paras. 873-74.

an appreciable level of avoided costs that could be used to generate a wholesale rate.³⁷ The Commission concluded that such services are not subject to section 251(c)(4) given that LECs would not avoid any "retail" costs when offering these services at "wholesale" rates to those same interexchange carriers. Similarly, here the DSL services are designed for and sold to Internet Service Providers as an input component to the Internet Service Providers' retail high-speed Internet service. DSL services sold to Internet Service Providers are not targeted to end-user subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, an unregulated information service, to the ultimate end-user.³⁸ As stated above, in offering this information service, the Internet Service Provider will take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user. Incumbents would not avoid any appreciable level of retail costs associated with providing these typical retail functions for the ultimate end-user when offering these bulk services to the Internet Service Providers.³⁹ It is reasonable to conclude, therefore, that such services do not fit within the type of transaction Congress intended to include under the discounted resale obligation in section 251(c)(4).

18. By interpreting "at retail" in the manner described above, we give it a meaning consistent with the primary objective of section 251: opening the local exchange market to competition in all services to ensure that consumers reap the benefits of broad-based and long-lasting competition. In particular, section 251 requires all incumbent LECs to provide nondiscriminatory access to their network facilities,⁴⁰ thereby allowing competing carriers to enter the local exchange and exchange access markets by purchasing parts of the incumbent's network or by reselling the incumbent's services at wholesale rates. Section 706 sets forth the complementary goal of facilitating investment and deployment of innovative technologies, specifically, those that provide advanced telecommunications capabilities, to all consumers. Thus, in giving meaning to the term "at retail" in the context of the sale of advanced services to residential and business end-users and to Internet Service Providers, we focus on the effect our determination will have on the deployment of advanced services in a competitive, broad-

³⁷ *Id.*

³⁸ See Jason Oxman, *The Commission and the Unregulation of the Internet*, OPP Working Paper Series No. 31, July 1999 at 11-13.

³⁹ We note that the Bell Atlantic tariff does not restrict the purchase of such DSL services to Internet Service Providers.

⁴⁰ *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4.

based, and expeditious manner. We conclude, therefore, that the interpretation and application of the term "at retail" set out above best promotes the pro-competitive and innovation-enhancing purposes of the Act.

IV. Conclusion

19. Based on the record before us and the fact specific evaluation set out above, we conclude that while an incumbent LEC DSL offering to residential and business end-users is clearly a retail offering designed for and sold to the ultimate end-user, an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering.⁴¹ Accordingly, we find that DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4). We conclude, however, that section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service.

20. We are confident that our findings reinforce the resale requirement of the Act by ensuring that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates, thus ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs. Moreover, we expect that our conclusions will stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans.⁴² We believe that our conclusions will encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services. We note that our conclusions herein do not change the regulatory status of the Internet Service Provider, which we have previously concluded to be an information

⁴¹ We disagree with NAS that this conclusion opens a loophole in section 251(c)(4). NAS White Paper at 5-6. Incumbent LECs are still under a statutory obligation to provide any telecommunications services, including DSL, T-1, DS-3, and business exchange services, sold at retail to subscribers who are not telecommunications carriers to requesting carriers at wholesale rates. See 47 U.S.C. § 251(c)(4).

⁴² See 47 U.S.C. § 157.

service provider rather than a telecommunications carrier.⁴³ We believe that maintaining the non-carrier status of Internet Service Providers, in this instance, benefits the public interest.⁴⁴

21. Moreover, we agree with NTIA that although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services. These obligations include: providing such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements.⁴⁵

22. Based on the foregoing, we clarify the Commission's decision regarding the scope of section 251(c)(4) set forth in the *Local Competition First Report and Order*.⁴⁶ We affirm that the type of exchange access services predominantly offered to interexchange carriers are not subject to the discounted resale obligations of section 251(c)(4). In addition, we amend our rules to clarify that advanced services sold to Internet Service Providers as an input component to the Internet Service Providers' own retail Internet service offering are not subject to the discounted resale obligations of section 251(c)(4). We also amend our rules to clarify that, notwithstanding the fact that advanced services sold to Internet Service Providers are excluded from the discounted resale obligations of section 251(c)(4), advanced telecommunication services sold directly to residential and business end-users are not exempt from these obligations, even though such services may be classified as exchange access services.⁴⁷

⁴³ See *Report to Congress on Universal Service*, 13 FCC Rcd at 11529, para 58 (finding that "[a]n offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components").

⁴⁴ Letter from Susanne Guyer, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-147, at 1 (filed June 26, 1999) (Bell Atlantic June 26 *Ex Parte*). This conclusion does not affect the incumbent LECs' universal service contribution requirements. Incumbent LECs must base their contributions on end-user telecommunications revenues, which generally include revenues derived from Internet Service Providers. See *1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, Commission 99-175, CC Docket No. 98-171, at n.127 (rel. July 14, 1999). Bulk sales of DSL services to Internet Service Providers are included in this requirement.

⁴⁵ NTIA May 7 *Ex Parte*. NTIA also argues that the incumbent LECs must show that the DSL rates that they charge to their Internet Service Provider customers, including any volume and term discounts, cover all relevant costs of providing service, including a reasonable share of the costs of the underlying subscriber loop. We do not address in this order the issue of proper allocation of loop costs.

⁴⁶ *Local Competition First Report and Order*, 11 FCC Rcd at 15934-36, paras. 871-877.

⁴⁷ We amend 47 C.F.R. §§ 51.605 and 607 as set forth in Appendix B.

V. Final Regulatory Flexibility Act Analysis

23. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the impact on small entities of the conclusions in this order. The FRFA is set forth in Appendix C.

VI. Ordering Clauses

24. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 10, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201, 202, 251-254, 256, 271, and 303(r), the SECOND REPORT AND ORDER is hereby ADOPTED. The requirements adopted in this Order shall be effective 30 days after publication of a summary thereof in the Federal Register.

25. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this SECOND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A**Advanced Telecommunications Services****CC Docket No. 98-147****Comments****September 25, 1998**

1. ADC Telecommunications, Inc.
2. Ad Hoc Telecommunications Users Committee
3. Alliance for Public Technology
4. Allegiance Telecom, Inc.
5. America Online, Inc.
6. America's Carriers Telecommunications Association (ACTA)
7. Ameritech
8. Association for Local Telecommunications Services (ALTS)
9. AT&T Corp.
10. Bell Atlantic
11. BellSouth Corporation
12. Cable & Wireless, Inc.
13. Cablevision Lightpath, Inc.
14. Central Texas Telephone Cooperative, Inc.
15. Cincinnati Bell Telephone Company
16. Coalition of Utah Independent Internet Service Providers
17. Commercial Internet Exchange Association
18. Communications Workers of America
19. Competition Policy Institute
20. Competitive Telecommunications Association (CompTel)
21. Computer & Communications Industry Association
22. Consumer Federation of America
23. Copper Mountain Networks, Inc.
24. Cottonwood Communications
25. Covad Communications Company
26. CTSI, Inc.
27. e.spire Communications, Inc.
28. Federal Trade Commission
29. First Regional TeleCOM, LLC and FirstWorld Communications, Inc.
30. Florida Digital Network, Inc.
31. Florida Public Service Commission
32. General Services Administration
33. GST Telecom Inc.
34. GTE Service Corporation
35. GVNW Inc.
36. Hyperion Telecommunications, Inc.
37. ICG Telecom Group, Inc.
38. Illinois Commerce Commission

39. Indiana Utility Regulatory Commission and Staff of Public Service Commission of Wisconsin
40. Information Technology Association of America
41. Intermedia Communications Inc.
42. Internet Access Coalition
43. Internet Service Providers' Consortium
44. Keep America Connected, United Homeowners Association, Alpha One, American Council on Education, National Braille Press, National Association of Commissions for Women, the National Trust for the Development of African American Men, National Association for College and University Business Officers, Latin American Women and Supporters, Harlem Consumer Education Council, National Latino Telecommunications Task Force, Northern Virginia Resource Center for the Deaf and Hard of Hearing, MaineCITE Coordinating Committee, Florida Association for the Deaf, American Telemedicine Association, World Institute on Disability, The Massachusetts Assistive Technology Partnership, and National Association of Development Organizations
45. Kiesling Consulting LLC
46. KMC Telecom, Inc.
47. Level 3 Communications, Inc.
48. MachOne Communications, Inc.
49. McLeodUSA Telecommunications Services, Inc.
50. MCI WorldCom, Inc.
51. MGC Communications, Inc.
52. Mindspring Enterprises, Inc.
53. Minnesota Department of Public Service
54. Moultrie Independent Telephone Company
55. National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telephone Companies (NRTA/OPASTCO)
56. National Telephone Cooperative Association
57. Network Access Solutions, Inc.
58. Network Plus, Inc.
59. New Networks Institute (Bruce Kushnick)
60. New World Paradigm, Ltd.
61. New York Department of Public Service
62. NEXTLINK Communications, Inc.
63. Northern Telecom, Inc.
64. Northpoint Communications Inc.
65. OpTel, Inc.
66. Paradyne Corporation
67. Paging and Messaging Alliance of the Personal Communications Industry Association
68. Paging Network, Inc. (PageNet)
69. People of the State of California and PUC of California
70. PSINet, Inc.
71. Public Utility Commission of Texas
72. Qwest Communications Corporation
73. RCN Telecom Services, Inc.

74. Rhythms NetConnections, Inc.
75. Rural Telecommunications Group
76. SBC Communications Inc.
77. Sprint Corporation
78. Supra Telecommunications and Information Systems, Inc.
79. Tandy Corporation
80. Technology Entrepreneurs Coalition
81. TCA, Inc.
82. Telecommunications Resellers Association
83. Telehub Network Services Corporation
84. Time Warner Telecom
85. Transwire Communications, Inc.
86. United States Small Business Association
87. United States Telephone Association
88. UTC
89. U S WEST Communications, Inc.
90. US Xchange, LLC
91. Virtual Hipster (Shad Nygren)
92. Warner, Jim
93. Washington Association of Internet Service Providers
94. Westel, Inc.
95. Williams Communications, Inc.
96. xDSL Networks, Inc.

Reply Comments -- October 16, 1998

1. Allegiance Telecom, Inc.
2. ALLTEL Communications Services Corporation
3. Ameritech
4. Association for Local Telecommunications Services (ALTS)
5. AT&T Corp.
6. Aware, Inc.
7. Bell Atlantic
8. BellSouth Corporation
9. Coalition of Utah Independent Internet Service Providers
10. Commercial Internet Exchange Association
11. Consumer Federation of America
12. Covad Communications Company
13. CTSI, Inc.
14. DSL Access Telecommunications Alliance
15. e.spire Communications, Inc.
16. Excel Telecommunications, Inc.
17. Florida Digital Network, Inc.
18. General Services Administration
19. GST Telecom Inc.

-
20. GTE Service Corporation
 21. Hyperion Telecommunications, Inc.
 22. Intermedia Communications Inc.
 23. Keep America Connected, United Homeowners Association, Harlem Consumer Education Council, National Latino Telecommunications Task Force, American Telemedicine Association, National Association of Development Organizations, Alpha One, and The World Institute on Disability
 24. KMC Telecom, Inc.
 25. Level 3 Communications, Inc.
 26. MachOne Communications, Inc.
 27. MCI WorldCom, Inc.
 28. MGC Communications, Inc.
 29. Mindspring Enterprises, Inc.
 30. Moultrie Independent Telephone Company
 31. National Cable Television Association
 32. National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies
 33. National Telephone Cooperative Association
 34. Network Access Solutions, Inc.
 35. Network Plus, Inc.
 36. New World Paradigm, Ltd.
 37. Next Level Communications
 38. NEXTLINK Communications, Inc.
 39. Northpoint Communications Inc.
 40. Qwest Communications Corporation
 41. RCN Telecom Services, Inc.
 42. Rural Telecommunications Group
 43. SBC Communications Inc.
 44. Sprint Corporation
 45. Telecommunications Resellers Association
 46. Telehub Network Services Corporation
 47. Teligent, Inc. and Net2000 Group, Inc.
 48. Time Warner Telecom
 49. Transwire Communications, Inc.
 50. United States Small Business Association
 51. United States Telephone Association
 52. Universal Service Alliance
 53. U S WEST Communications, Inc.
 54. Verio Inc.
 55. Virgin Islands Telephone Corporation

APPENDIX B - Final Rules**AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS****PART 51 - INTERCONNECTION**

* * * *

Subpart G - Resale**§ 51.605 Additional obligations of incumbent local exchange carriers**

2. Section 51.605 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended by deleting paragraph (b) and by adding the following new paragraphs after paragraph (a): (b), (c), (d), and (e) to read as follows:

* * * *

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(c) For purposes of this subpart, advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(d) Notwithstanding paragraph (b) of this section, advanced telecommunications services that are classified as exchange access services are subject to the obligations of § 51.605(a) of this part if such services are sold on a retail basis to residential and business end-users that are not telecommunications carriers.

(e) Except as provided in § 51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

§ 51.607 Wholesale pricing standard.

3. Section 51.607 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended by deleting paragraph (b) and striking "(a)" before the beginning of the remaining text.

APPENDIX C -- FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Advanced Services Order and NPRM*.² The Commission sought written public comment on the proposals in the *Advanced Services Order and NPRM*, including comment on the IRFA. [The comments received are discussed below.] This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

I. Need for and Objectives of this First Report and Order and the Rules Adopted Herein.

2. In order to encourage competition among carriers to develop and deploy new advanced services, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers. In this *Second Report and Order*, we seek to ensure that all carriers have economic incentives to innovate and invest in new technologies.

3. We amend our rules to clarify that advanced services sold to Internet Service Providers as an input component to the Internet Service Providers' own retail Internet service offering are not subject to the discounted resale obligations of section 251(c)(4). We also amend our rules to clarify that, notwithstanding the fact that advanced services sold to Internet Service Providers are excluded from the residential resale obligations of section 251(c)(4), advanced telecommunication services sold directly to residential and business end-users are not exempt from these obligations, even though such services may be classified as exchange access services.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.

4. In the IRFA, we stated that any rule changes would impose minimum burdens on small entities. We indicated that the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact they may have on small entities. The comments we received did not respond directly to the issue addressed in this Order.⁴

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² *Advanced Services Order and NPRM*, 13 FCC Rcd 24102 (1998).

³ See 5 U.S.C. § 604.

⁴ We note, however, that the Office of Advocacy, United States Small Business Administration (SBA) commented on other issues raised in the *Advanced Services Order and NPRM*.

III. Description and Estimates of the Number of Small Entities Affected by the First Report and Order.

5. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.⁶ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).⁷ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.⁸ We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

6. The most reliable source of information regarding the total numbers of common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).⁹ According to data in the most recent report, there are 3,604 interstate carriers.¹⁰ These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

7. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹¹ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of

⁵ 5 U.S.C. § 601(6).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

⁷ 15 U.S.C. § 632. See, *e.g.*, *Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

⁸ 13 C.F.R. § 121.201.

⁹ FCC, *Carrier Locator: Interstate Service Providers*, Figure 1 (Jan. 1999) (*Carrier Locator*). See also 47 C.F.R. § 64.601 *et seq.*

¹⁰ *Carrier Locator* at Fig. 1.

¹¹ 5 U.S.C. § 601(3).

operation because any such dominance is not "national" in scope.¹² We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

8. Total Number of Telephone Companies Affected. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.¹³ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."¹⁴ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the decisions and rules proposed in the Notice.

9. Wireline Carriers and Service Providers. SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.¹⁵ According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.¹⁶ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone

¹² Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

¹³ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

¹⁴ 15 U.S.C. § 632(a)(1).

¹⁵ 1992 Census, *supra*, at Firm Size 1-123.

¹⁶ 13 C.F.R. § 121.201, SIC Code 4813.

communications companies other than radiotelephone companies that may be affected by the decisions and rules proposed in the Notice.

10. *Local Exchange Carriers, Resellers and Internet Service Providers.* Neither the Commission nor SBA has developed a definition of small local exchange carriers (LECs), competitive local exchange carriers (CLECs), resellers, or Internet Service Providers (ISPs). The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹⁷ The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).¹⁸ According to our most recent data, there are 1,410 LECs, 129 CLECs,¹⁹ and 351 resellers.²⁰

11. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,410 small entity LECs or small incumbent LECs, 129 CLECs, and 351 resellers that may be affected by the decisions and rules proposed in the Notice.

12. *Internet Service Providers.* SBA has developed a small business size standard for "Information Retrieval Services," SIC code 7375.²¹ This category includes establishments primarily engaged in providing online database information retrieval services, on a contract or fee basis. According to SBA regulations, a small business under this category is one having annual receipts of \$18 million or less.²² Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA's \$18 million size standard for SIC code 7375.²³ Although some of these Internet Service Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected by the decisions and rules of the present action.

¹⁷ 13 C.F.R. § 121.210, SIC Code 4813.

¹⁸ See 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator* at Fig. 1.

¹⁹ The total for CLECs includes both CLECs and competitive access providers (CAPs).

²⁰ *Carrier Locator* at Fig. 1. The total for resellers includes both toll resellers and local resellers.

²¹ See Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification (SIC) Manual*, at 366 (1987).

²² 13 C.F.R. § 121.201, SIC Code 7375.

²³ Office of Advocacy, U.S. Small Business Administration, *Firm Size Data by Industry and Location*. See <http://www.sba.gov/advo/stats/int_data.html> (last visited June 1, 1999).

IV. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

13. We require incumbent LECs to make available at a wholesale discount advanced services sold at retail to residential and business end-users, without regard to their classification as telephone exchange service or exchange access service. We determine that complying with these rules may require use of operational, accounting, billing, and legal skills. We believe, however, that incumbent LECs will already have these skills.

14. The burden of compliance with this requirement is minimal because, pursuant to section 251(c), incumbent LECs already must comply with state mandated wholesale discount requirements for all telecommunications services they provide at retail to subscribers who are not telecommunications carriers.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.

15. Section 251(c)(4) imposes on all incumbent LECs, including small incumbent LECs, the duty to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."²⁴ The Commission's conclusions in this order clarifies this statutory obligation. The order imposes no additional obligations on incumbent LECs.

VI. Report to Congress

16. The Commission will send a copy of the *SECOND REPORT AND ORDER*, including this *FRFA*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *SECOND REPORT AND ORDER*, including *FRFA*, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *SECOND REPORT AND ORDER* and *FRFA* (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

²⁴ 47 U.S.C. § 251(c)(4).